

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of)
)
)
Leslie D. Brewer)
)
)
For Special Temporary Authorization to Operate)
an Unlicensed FM Broadcast Station)
)
and)
)
)
For a Construction Permit for a Noncommercial)
Educational FM Broadcast Station on Channel)
271A (102.1MHz), Temple Terrace, FL)
)
)

MEMORANDUM OPINION AND ORDER

Adopted: January 30, 2002

Released: February 8, 2002

By the Commission:

1. The Commission has under consideration an application for review filed by Leslie D. Brewer on July 17, 1997. Mr. Brewer requests review of a staff decision, which (1) denied his May 10, 1996 request for special temporary authorization (“STA”) to operate an unlicensed FM broadcast station, and (2) returned as unacceptable for filing his November 8, 1996 application for a FM noncommercial educational (“NCE”) construction permit on Channel 271A, Temple Terrace, Florida. See June 19, 1997 Letter to Mr. Leslie D. Brewer from Linda Blair, Chief, Audio Services Division, Mass Media Bureau (Ref. No. 1800B3-BJB) (“Staff Decision”). For the reasons set forth below, we deny the application for review.

Background.

2. Mr. Brewer operated a broadcast station without authorization on 102.1 MHz at Temple Terrace between 1996 and 2000 with output powers ranging between .1 and 10 watts. On May 10, 1996, Mr. Brewer requested an STA pursuant to 47 C.F.R. §15.7(a),¹ which provides for special temporary authority in exceptional situations where the operation (1) does not conform to Part 15 of the Commission’s Rules; (2) would be a unique type of station that cannot be established as a regular service; and (3) would serve the public interest. The staff determined that the STA request failed to show that an exceptional situation existed or that a grant would serve the public interest.

3. As for the Temple Terrace, FL application, the staff returned the Temple Terrace, FL application for a construction permit as unacceptable for tender because Channel 271A is not allotted to

¹ Because the Commission no longer licensed radio broadcast stations with those power levels under Part 73 of the Commission’s rules, the STA request sought temporary authority under Part 15. Part 15 of the Commission’s rules regulates the operation of devices that emit radio frequency energy at very low power levels.

Temple Terrace, Florida.² Pursuant to the Commission's rules, 47 C.F.R. §73.203(a), applications to construct FM broadcast stations on non-reserved channels may be filed only at the communities and on the channels contained in the Table of Allotments. See 47 C.F.R. §73.202(b). In July and October of 1996, the Commission received interference complaints, although not specifically related to the STA request or Temple Terrace application, from Paxson Tampa License L.P. ("Paxson"), licensee of WHPT(FM), Sarasota, FL regarding Mr. Brewer's unauthorized operations during that time.

4. In his application for review of the *Staff Decision*, Mr. Brewer argues that the staff erred in denying the 1996 STA request because the denial was based upon Paxson's "inaccurate interference" complaints. He contends that the staff failed to give due consideration to his request because he lacks the "congressional lobbying ability" of corporate applicants, such as Paxson. Mr. Brewer also challenges the Commission's authority to regulate broadcast transmissions, and claims that the denial of the STA request and return of the Temple Terrace application violate his constitutional and civil rights.

5. After an investigation lasting for more than five years, the Enforcement Bureau recently determined in an *Order of Revocation and of Forfeiture*, EB Docket No. 01-61, DA 01-1489 (rel. June 26, 2001) ("Revocation Order"), that Mr. Brewer lacks the basic character qualifications to be a Commission licensee.³ In addition to assessing a forfeiture, the Commission also revoked Mr. Brewer's Amateur Radio and General Mobile Radio Service licenses. The investigation revealed that Mr. Brewer had been broadcasting without a license in violation of 47 U.S.C. §301 and was marketing and selling unauthorized FM broadcast transmitting equipment in violation of 47 C.F.R. §§ 2.803(a)(1) and 15.201(b). Mr. Brewer did not appeal the Revocation Order, and it became final on August 6, 2001.

Discussion.

6. We find that the arguments raised on review are meritless. First, Mr. Brewer provides no evidence that the Commission discriminated against him, or that it gave either the STA request or the application unfair treatment by favoring corporations rather than individual applicants. Second, Mr. Brewer incorrectly assumes that the staff denied the STA request based on Paxson's interference complaints. While those complaints were considered, the staff properly denied the STA because Brewer failed to establish that an exceptional situation existed or that grant would be in the public interest. Indeed, Mr. Brewer offered no argument or evidence other than a bare, conclusory assertion to support his contention in this regard. Similarly, the staff properly returned the Temple Terrace application for failure to specify a community of license and channel listed in the Table of FM Allotments.

7. Moreover, the Supreme Court on numerous occasions has upheld the Commission's authority to regulate broadcasting, finding that such regulation is not only lawful, but also necessary. See, *United States v. Southwest Cable Co.*, 392 U.S. 157, 168 (1968) (upheld the Commission's exclusive jurisdiction over broadcast regulation.); *National Broadcasting Co. v. U.S.*, 319 U.S. 190 (1943) (Upheld

² Most NCE stations operate in the reserved portion of the FM band, channels 201-220. There is no table of allotments in that portion of the band, and Section 73.203(a) is inapplicable to that portion. An NCE applicant may apply for a construction permit for a channel in the non-reserved band, as Brewer did with his Temple Terrace proposal. In these circumstances an applicant must satisfy the requirements of 47 C.F.R. §§ 73.201-73.213 (classification of FM broadcast stations and allocations of frequencies); See 47 C.F.R. § 73.513(a).

³ On March 5, 2001, the Commission designated a case for hearing to determine, *inter alia*, whether Mr. Brewer had the basic qualifications to be and remain a Commission licensee. See *Order to Show Cause, Notice of Order of Suspension, Notice of Opportunity for Hearing, and Notice of Apparent Liability for a Forfeiture*, 16 FCC Rcd 5671 (2001). By *Memorandum Opinion & Order*, FCC 01M-11 (released May 4, 2001), the Presiding Judge determined that Mr. Brewer had received a copy of the *Order to Show Cause*, but had failed to file a notice of appearance seeking to avail himself of the opportunity to be heard. Thus, the Presiding Judge concluded that Mr. Brewer waived his right to a hearing, terminated the proceeding, and certified the case to the Commission for disposition.

Congressional delegation of authority to the Commission to regulate broadcasting, and to adopt such rules and regulations and prescribe restrictions and conditions as necessary.); and, *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940) (Congress conferred broad authority on the Commission so as “to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmissions.”) Thus, Mr. Brewer’s argument that the Commission lacks authority to regulate broadcasting is frivolous.

8. We also find that neither the denial of the STA request nor the return of the Temple Terrace application violated Mr. Brewer’s constitutional or civil rights. The Supreme Court has made clear that the First Amendment does not confer a right to broadcast without a license. See *National Broadcasting Co.*, 319 U.S. at 227 (the right to free speech does not include the right to use radio facilities without a license). Moreover, courts have found that the Commission’s regulatory schemes contain adequate safeguards to protect applicants’ and licensees’ due process rights. See e.g. *United States v. Dunifer*, 997 F. Supp 1235, 1243 (N.D. Calif. 1998) (citing *Freedman v. Maryland*, 380 U.S. 51 (1951) (regulatory scheme for licensing radio stations and waivers provides adequate procedural safeguards), *aff’d on other grounds*, 219 F.3d 1004 (9th Cir. 2000)). Here, we find that the staff properly followed Commission procedures as set forth under 47 C.F.R. §73.3573 (procedures for processing FM broadcasting station applications) and 47 C.F.R. §15.7(a) (procedures for resolving STA requests). In addition, Mr. Brewer has the statutory right to appeal the Commission’s decision to the Court of Appeals for the District of Columbia. See 47 U.S.C. §402(b).

9. Accordingly, IT IS ORDERED, that the application for review filed by Leslie D. Brewer IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary